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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. MACK BONDS, Defendant and Appellant.	C080951 (Super. Ct. No. STKCR20140006035, SF127876A)

Following a jury trial, defendant Mack Bonds was convicted of evading a peace officer with willful and wanton disregard for the safety of others ("reckless evading"). (Veh. Code, § 2800.2.) The trial court sentenced defendant to the upper term of three years in state prison.

On appeal, defendant contends there was insufficient evidence that he was the perpetrator of the charged criminal offense and the trial court erred in sentencing him to the upper term.

We conclude there was substantial evidence establishing defendant's identity as the perpetrator of the charged crime. We further conclude the trial court properly exercised its discretion in imposing the upper term.

Finding no reversible error, we affirm.

I. BACKGROUND

A. Trial Evidence

On April 2, 2015, the People charged defendant with one count of recklessly evading a peace officer. He pleaded not guilty and his jury trial began on September 24, 2015.

1. The Prosecution's Case in Chief

City of Lodi Police Officer Paul Jimenez testified that on April 15, 2014, at approximately 9:30 p.m., he was on patrol when he saw an older model Chevy Blazer traveling without its headlights on. Jimenez moved behind the Blazer and activated the patrol car's overhead lights to initiate a traffic stop. At the same time, Jimenez called in the Blazer's license plate and location to dispatch.

The Blazer turned right, continued forward, then stopped in a McDonald's parking lot. According to Officer Jimenez, the parking lot was "well lit." He parked his patrol car directly behind the Blazer, with the headlights pointed at the Blazer. Jimenez got out of the patrol car and approached the Blazer by the driver's side door.

The Blazer was "lifted" so Officer Jimenez could see only from the window line up. Standing approximately six feet from the opening of the driver's door, Jimenez saw the driver's face and a "little of" his upper body. He described the driver as having a "dirty appearance," with "longer" hair of about an inch or two, and a "shorter beard." Jimenez also testified that he smelled marijuana emanating from the Blazer and saw that the driver's eyes were red, bloodshot, and watery. No one else was in the car.

Officer Jimenez testified that the driver of the Blazer stuck his head out of the window and asked, "What'd you stop me for?" Jimenez asked to see his license and registration. The driver reached over to the passenger side of the Blazer for a few seconds then drove off through the parking lot toward an alley.

Officer Jimenez returned to his patrol car and pursued the Blazer. The pursuit continued through numerous residential areas reaching speeds of 50 to 70 miles per hour. The Blazer ran through a stop sign and two red lights. The car also sped through a hospital parking lot, near the emergency room entrance where several people were standing. Jimenez terminated the pursuit after approximately three miles, when it became too dangerous.

A records check identified defendant as the registered owner of the Blazer. Officer Jimenez also identified defendant as the driver of the Blazer after seeing a photo of defendant in a law enforcement database. Jimenez identified defendant as the driver again at trial, though he acknowledged defendant looked different in court: His hair was shorter, he did not have a beard, and he was wearing glasses.

2. Defense Evidence

In response to the People's evidence, defendant testified and denied being the person stopped by Jimenez or involved in the pursuit. Defendant also testified that he was not in Lodi at the time of the pursuit and, in fact, had not been in Lodi for years. He acknowledged the Blazer was his but said that it was stolen on April 15, 2014, and not recovered until approximately the 23rd or 24th of April.

According to defendant, on April 15, 2014, he was living with his uncle Donald Lackey in an apartment complex. He got off of work between 6:00 and 6:30 p.m., and was home about an hour later. When he got home, he parked the Blazer at the curb outside of the parking lot of the complex. He and his uncle had dinner then watched a series of reruns on DVDs. Defendant went to bed sometime between 10:00 and 11:00 p.m.

Defendant's uncle also testified. He said that, on April 15, 2014, defendant got home from work around 7:00 p.m. They had dinner, watched a DVD set of "In Living

Color," and went to bed sometime between 11:00 p.m. and 2:00 a.m.[1] Lackey saw defendant still in the apartment at 3:00 a.m., when he got up to take his medication, and again at 7:00 a.m., when he got up to get ready for work.

On the morning of April 16, 2014, defendant and Lackey saw the Blazer was no longer parked at the curb.[2] Where the car had been parked was some trash and a rag that was previously inside the Blazer. Defendant called the Stockton police and reported the Blazer missing. He also called his insurance company but was told he did not have full coverage.

Defendant described the Blazer as a "fixer-upper." The key had broken off in the ignition so the vehicle would start just by turning the ignition. The door locks did not work, the back window did not work, and one could get into the Blazer through the side vents. Lackey also testified that because the ignition was broken, the vehicle could be started with a screwdriver—not a key.

About a week later, defendant saw the Blazer parked on a curb, down the street from his apartment.[3] He saw the inside was ransacked and the rims were scratched. Defendant got gas to put in the tank then drove it back to his apartment. Within an hour, the Stockton Police Department called defendant and he verified that he had recovered his vehicle. A few hours later, Stockton police arrested defendant then turned him over to the Lodi police. Defendant was held for three days then released. Defendant testified that he was told they were not pressing charges.

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[1] Lackey was not entirely certain when they went to bed but knew it was "late."

[2] Defendant testified he found the car missing around 10:30 or 11:00 a.m. Lackey remembered it was around 9:30 or 10:00 a.m.

[3] Lackey did not see the Blazer again until defendant was arrested, when Lackey saw the Blazer parked in his assigned parking space.

Seven months later, defendant was arrested. According to defendant, the arresting officers approached him with guns pointed and told him there was a warrant for his arrest on multiple charges, including assaulting an officer. Defendant testified that he was taken to jail and the next day learned he was actually arrested on the reckless evading charge.

3. Rebuttal

The People offered rebuttal testimony from Stockton Police Officer Matthew Huff. Officer Huff testified that he met with defendant at defendant's apartment on April 22, 2014, after defendant called the police to report the Blazer no longer missing. As described by Huff, the Blazer's ignition appeared to be intact and, other than some scratches "here and there," Huff saw no damage to the Blazer.

Ultimately, the jury found defendant guilty as charged.

B. Sentencing

Prior to sentencing, the probation department issued a report and recommendation in which the department concluded defendant was not eligible for probation. The department thus recommended defendant be sentenced to prison but made no recommendations regarding the length of that sentence.

At sentencing, defendant's trial counsel argued that defendant's most serious convictions were "several years ago." He also argued that defendant worked two jobs, having maintained one of them for four years. Counsel noted defendant's efforts to improve his situation by leaving San Joaquin County and moving to the Northern California border, where he was a good tenant and appreciated by his landlords. The court also heard from two witnesses who spoke on defendant's behalf, both of whom implored the court to give defendant a chance. Defendant also apologized for his conduct and told the court, "[s]o I gotta just kind of swallow my pill and take it. Thank you."

Addressing defendant, the trial court said, "I think you have been doing good. And I think you were smoking weed. And if you hadn't taken off, you probably would just be looking at possession of marijuana or maybe another violation of probation.

"But you got scared. And you were smoking weed, which is all in your background. You have nine violations of probation on your marijuana, so—you got a felony for growing marijuana. You were put on probation. And you violated nine times for dirty tests, for not showing up, for not doing your jail time. In the very beginning, you even said, 'Hey, you guys are wasting your time watching me. I'm not a meth head.'

"Well, the marijuana got you in trouble at the beginning and it got you in trouble again because, you know—so that's what happens. And you were smoking weed out there. And if you had not just not [*sic*] run, you wouldn't be looking at prison now." In sum, the court noted, defendant "obviously [had] a pot problem."

The court found defendant was "not a candidate for probation because [defendant was] on probation when this happened and [he] did not perform well on probation." The trial court then sentenced defendant to the upper term of three years in state prison. In imposing the upper term, the court found defendant had "been to prison before" and that in committing the crime, defendant engaged in "violent conduct."

II. DISCUSSION

A. Substantial Evidence

Defendant argues there was insufficient evidence to support his conviction for reckless evading. Specifically, he contends there was insufficient evidence admitted at trial to identify him as the driver of the car that was recklessly evading Officer Jimenez.

"In deciding the sufficiency of the evidence, we ask whether ' "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citation.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to

determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Here, Officer Jimenez identified defendant as the perpetrator of the charged offense. Defendant presented testimony that he was at home and his car was stolen that night, but the jury evidently found Jimenez's testimony more credible, a determination that is exclusively within the jury's province. Moreover, defendant did not identify any physical impossibilities or inherent improbabilities that could justify rejecting Jimenez's testimony. We thus conclude substantial evidence supports the jury's verdict that defendant was the perpetrator of the charged crime.

B. Imposition of the Upper Term

Defendant further contends that, in sentencing him to the upper term, the trial court relied on an improper aggravating factor and improperly ignored defendant's drug use as a mitigating factor. The People argue defendant forfeited his claims by failing to object in the trial court and, in any event, his claims are meritless. The People are correct.

1. Forfeiture

The record establishes that, at sentencing, defendant did not object to any of the factors now challenged. The lack of a timely and meaningful objection by defendant to his criminal sentence results in forfeiture of his claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351; *People v. Partida* (2005) 37 Cal.4th 428, 434; *People v. Brach* (2002) 95 Cal.App.4th 571, 577 ["Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' are waived on appeal if not first raised in the trial court" (italics omitted)].) We will nevertheless

address defendant's challenge because he contends trial counsel's failure to object amounts to ineffective assistance of counsel.

2. Ineffective Assistance of Counsel

a. Legal standards

To establish ineffective assistance of counsel, a defendant must show "counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial." (*People v. Seaton* (2001) 26 Cal.4th 598, 666, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693] (*Strickland*).) "[T]he burden is on the defendant to show (1) [defense] counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; see also *People v. Weaver* (2001) 26 Cal.4th 876, 961.)

"[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 437, quoting *Strickland, supra*, 466 U.S. at p. 689; see also *People v. Vines* (2011) 51 Cal.4th 830, 876.) The defendant bears the burden of establishing an ineffective assistance claim. (*Lucas, supra,* at p. 436; *People v. Pope* (1979) 23 Cal.3d 412, 425.) "Surmounting *Strickland's* high bar is never an easy task. [Citation.]" (*Padilla v. Kentucky* (2010) 559 U.S. 356, 371 [176 L.Ed.2d 284, 297].)

b. No deficient performance

In evaluating whether there was deficient performance by trial counsel, we must first determine whether the trial court considered improper aggravating factors or ignored relevant mitigating factors in imposing the upper term sentence. We conclude that no such error occurred.

Trial courts have "discretion under [Penal Code] section 1170, subdivision (b), to select among the lower, middle, and upper terms specified by statute without stating

ultimate facts deemed to be aggravating or mitigating under the circumstances and without weighing aggravating and mitigating circumstances. [Citation.] Rather, 'a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions.' " (*People v. Jones* (2009) 178 Cal.App.4th 853, 866.) A single factor in aggravation may justify a trial court's exercise of its sentencing discretion in imposing the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730; see also *People v. Black* (2007) 41 Cal.4th 799, 813.)

Here, in imposing the upper term, the trial court found defendant had "been to prison before" and defendant engaged in "violent conduct" that "indicated a dangerous flight" in that defendant's conduct "could have easily killed someone." (Cal. Rules of Court, rule 4.421(b)(1) & (3).) Defendant only challenges the court's finding that his conduct was violent. Defendant argues there was no evidence that his conduct was any more violent than the violence implied in the definition of reckless evading. Thus, he argues, the trial court improperly relied on an element of the crime in imposing the upper term. Whether he is correct, the court also found defendant's prior prison term to be an aggravating factor. That single factor is enough to justify imposition of the upper term. (*People v. Osband, supra*, 13 Cal.4th at p. 730.)

Defendant further contends the trial court failed to consider his "drug use and steps at rehabilitation" as a mitigating factor. The aggravating and mitigating circumstances enumerated in the rules of court "must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise." (Cal. Rules of Court, rule 4.409.) The trial court was aware of defendant's drug use, noting defendant had a "pot problem." Accordingly, we presume the court took that into account when determining defendant's sentence. Defendant has failed to prove otherwise.

In sum, we find the trial court properly exercised its discretion in sentencing defendant to the upper term.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

BLEASE, Acting P. J.

/S/

NICHOLSON, J.